

FINAL STATEMENT OF REASONS
FOR RULE CHANGES UNDER THE
CORPORATE SECURITIES LAW OF 1968

As required by Section 11346.2 of the Government Code, the California Corporations Commissioner ("Commissioner") sets forth below the reasons for the adoption of Section 250.70 of the California Code of Regulations (10 C.C.R. Sec. 250.70).

As California's Investment and Financing Authority, the Department of Corporations administers and enforces the Corporate Securities Law of 1968 ("CSL"). Corporations Code Section 25252 authorizes the Department of Corporations ("Department") to assess administrative penalties based on specified violations.

The Commissioner proposes to adopt rules specifying the uniform criteria used by the Department to base the assessment of administrative penalties under the CSL. By outlining a uniform criteria, this rulemaking helps ensure that administrative penalties are not assessed in an arbitrary and capricious manner.

Section 250.70: The adoption of Section 250.70 adds criteria for the assessment of administrative penalties. In determining the amount of any administrative penalty levied or assessed against any person for each violation of any statute, rule, or order, the Commissioner may consider a variety of factors including, but not limited to, the following:

- The nature and seriousness of the violations including the actual or potential harm to the public or consumer.
- The number and persistence of violations and the length of time over which they occurred.
- The person's history of violations or complaints with the Department, other agencies or regulators.
- Whether the person's conduct was negligent, willful, or knowing and the extent to which it was negligent, willful, or knowing.
- The person's financial condition including net worth and revenue.
- The nature and extent to which the person cooperated with the department's investigation.

- Whether the person aggravated or mitigated any injury or damage caused by the violations.
- The nature and extent to which the person has taken corrective action to ensure that violations will not reoccur.

This regulation is necessary because, although the CSL authorizes administrative penalties based on violations, existing law does not expressly include the factors that the Commissioner may consider in assessing administrative penalties. Nor does existing law establish guidelines for determining the amount of a penalty. This regulation informs licensees and the public about the factors that may prompt administrative penalties, as well as the factors that affect the size of the penalties. In addition, the regulation promotes fairness by providing uniform guidelines when assessing administrative penalties.

AUTHORITY

Section 25610, Corporations Code.

REFERENCE

Section 25252, Corporations Code.

ALTERNATIVES CONSIDERED

No reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the regulation is proposed, or would be as effective and less burdensome to affected private persons, than the adopted regulation.

DETERMINATIONS

The Department has made a determination that these regulations will not have a significant adverse economic impact on business. The regulations do not add new penalty provisions, but simply clarify existing administrative penalty provisions in the CSL.

The Department has determined that the adoption, amendment, or repeal of the regulation does not impose a mandate on local agencies or school districts, which require reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code.

Facts evidence, documents, testimony, or other evidence upon which the agency relies to support a finding that the action will not have a significant adverse economic impact on business, or would lessen any adverse economic impact on small business.

TECHNICAL, THEORETICAL, AND EMPIRICAL STUDY, REPORTS, OR SIMILAR DOCUMENTS RELIED UPON BY THE DEPARTMENT

In preparing this rulemaking, the Department considered the following factors: (1) Civil Code Section 56.36 (factors to consider in assessing penalties based on violations of law governing disclosure of medical information); and (2) Secretary of State Disciplinary Guidelines – 2001 (factors to consider in assessing penalties against notary publics).

ADDENDUM REGARDING PUBLIC COMMENTS

No request for hearing was received during the 45-day public comment period, which ended on June 23, 2003. No public hearing was scheduled or held.

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD

COMMENTOR: Keith Paul Bishop, Co-Chair and Bruce Dravis, Co-Chair, on behalf of the Corporations Committee, Business Law Section, the State Bar of California set forth comments in a letter dated June 17, 2003. Their comments together with the Department's responses are summarized below.

Comment 1: On pages 1 through 4 of the comment letter, the commentors set forth general observations under the heading "Background." To summarize, the commentors describe the following:

- Code sections governing administrative penalties.
- Differences between administrative penalties and civil penalties.
- Criminal penalties

Response: These comments do not suggest modifications of the proposed rule, nor do they express concerns regarding standards under the California Administrative Procedure Act ("APA") such as necessity, clarity, and consistency. For these reasons, no response is necessary with respect to these background comments.

Comment 2: On page 3 of their letter, the commentors express their view that the Commissioner is required to make available to a respondent a copy of its procedures, including any procedures for the determination of penalties, pursuant to the APA.

Response: This comment is outside the scope of rulemaking, since it involves the application of the APA. Nevertheless, it is important to note that nothing in Government Code Section 11425.10(a)(2) requires the Department to disclose the factors for determining administrative penalties. Rather, Section 11425.10(a)(2)

requires a state agency to disclose only the procedures by which an administrative hearing is conducted. The code distinguishes the prosecutorial function from the adjudication function.

Comment 3: The commentors believe the rules' criteria should reflect the "procedural aspects and the special responsibilities" of the Commissioner, as specified.

Response: The Department's proposed rulemaking addresses the concerns listed by the commentors, by establishing uniform factors to help achieve fairness and to avoid arbitrary and capricious actions. Staff is unaware of any provisions in the proposed rule (nor do the commentors suggest any) which would reduce the due process afforded by current law.

Comment 4: On page 4 of the their comment letter, under the second heading, the commentors suggest the rule should be based on transparency, consistency, deterrence, retribution, and accountability.

Response: The proposed rule already serves the purposes described by the commentors, and these purposes are described in the Initial Statement of Reasons. As indicated in the Initial Statement of Reasons, the proposed rule "informs licensees and the public about factors" (transparency); and "promotes fairness by providing uniform guidelines" (consistency); and includes a "variety of factors" based on the violations (deterrence and retribution); and helps avoid "arbitrary and capricious" application of administrative penalties (accountability). Thus, no further changes are needed.

Comment 5: On page 5, the commentors suggest the rule should be clarified to apply only to broker dealers and investment advisers.

Response: Clarification is unnecessary as the reference section of the rule makes it clear that the rule applies only to these persons .

Comment 6: On page 5 of their letter, the commentors also indicate the rule should take into consideration all interested stakeholders (i.e., licensees, victims, public).

Response: The proposed rule reflects the interests of all stakeholders, as suggested by the commentors. To help ensure the rule reflects these interests, the Department considered a number of factors recognized by the Legislature in Civil Code Section 56.36 and factors utilized by another agency, the Secretary of State.

Comment 7: On page 6 of their letter, the commentors suggest the rule should clearly establish mitigating and enhancing factors.

Response: The Department is not prepared to specify other mitigating or enhancing factors, at this time. To do so may enable law violators to avoid the deterrent and related purposes associated with administrative penalties.

There were no other comments received during the 45-day comment period, which ended on June 23, 2003.

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